United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,267

JUNIUS S. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID N. ELLENHORN,
Assistant United States Attorneys.

ROBERT S. BRADY,
Special Assistant United States Attorney.

Cr. No. 1103-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented.

1) Was there an illegal seizure of numbers paraphernalia where appellant was stopped by a police officer for a traffic violation and in complying with the officer's request to be shown the automobile registration card, appellant exposed to plain view three manila envelopes, with numbers and figures written on them, which were recognized by the officer as a type used in numbers operations?

2) Was it error for the trial court to refuse to admit into evidence newspaper advertisements of certain commercial companies offered by defense counsel for the alleged purpose of showing the operation of other lotteries in the District which where not being made subject to the lottery laws and therefore denying appellant equal protection of the laws where he was being charged with violating the lottery laws by engaging in a numbers operation?

INDEX

	Page
Counterstatement of the Case	1
Constitutional Provisions and Statutes Involved	3
Summary of Argument	5
Argument:	
I. The numbers slips were not obtained as the result of an illegal search or seizure.	6
II. The trial court properly excluded appellant's proffered exhibits.	7
Conclusion	8

TABLE OF CASES

Dorsey v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 928 (1967)	6
**Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953)	6
Fisher v. *United States*, 92 U.S. App. D.C. 247, 205 F.2d 702, *cert. denied*, 346 U.S. 872 (1953)	7
**Goodwin* v. *United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied, sub nom. Vaughn* v. *United States*, 382 U.S. 855 (1965)	6
Guy v. *United States*, 71 App. D.C. 89, 107 F.2d 288 (1939)	7
Grell v. *United States*, 112 F.2d 861 (8th Cir. 1940)	7
**Henry* v. *United States*, 361 U.S. 98 (1959)	6
**Hiet* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 911 (1967)	6, 7
Norman v. *United States*, D.C. Cir. Nos. 20243-5 decided May 9, 1967	6
O'Connor v. *District of Columbia*, 80 U.S. App. D.C. 351, 153 F.2d 225 (1946)	8
**Society of Good Neighbors* v. *Van Antwerp*, 324 Mich. 22, 36 N.W. 2d 308 (1949)	8
**Starr* v. *United States*, 105 U.S. App. D.C. 91, 264 F.2d 377, *cert. denied*, 359 U.S. 936 (1958)	7
United States v. *Manno*, 118 F.Supp. 511 (N.D. Ill. 1954)	8
**United States* v. *Rickenbacker*, 309 F.2d 462 (2d Cir.) *cert. denied*, 371 U.S. 962 (1963)	7, 8

* Cases chiefly relied upon are marked by asterisks.

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A two-count indictment was filed on October 4, 1965, charging Junius S. Washington with operation of a lottery and possession of numbers slips in violation of 22 D.C. Code §§ 1501, 1502. Appellant was tried before Judge Howard Corcoran and a jury and was found guilty as charged. He was subsequently sentenced to imprisonment for six to 18 months on Count 1 and for 6 months on Count 2, the sentences to run concurrently.

The evidence at trial disclosed that on July 22, 1965, appellant, while driving his car, was stopped by a plain-

clothes police officer in the 200 block of 11th Street, S.W. for making an improper U-turn which impeded traffic (Tr. 7-9, 18). The police officer testified that appellant, who had been parked at the curb facing south, pulled away from the curb, turning directly across the street in front of another car and forcing the driver of that car to abruptly apply his brakes [1] (Tr. 18). After he stopped the car, the police officer asked to see appellant's driver's license and automobile registration card. Appellant produced the license but was nervous and appeared reluctant to show the registration. The police officer had to ask for the registration again. Whereupon appellant opened the glove compartment of the car and some small manila envelopes fell out. (Tr. 9-11.) One envelope dropped on the door of the glove compartment and two others fell to the car floor. From his police training, the officer recognized the envelopes as the type sometimes used in numbers operations and noticed that there were numbers written on them. He asked what they were and appellant said they contained numbers and money that he was taking to someone. (Tr. 12.) At that juncture, appellant was told to get out of the car, that he was under arrest. A search of appellant revealed more money and slips in a brown paper bag found in appellant's trouser pocket. (Tr. 13).

Prior to trial a motion to suppress and return the seized property was heard and denied. At trial defense counsel attempted to have admitted into evidence 40 or 50 exhibits which he contended would prove the existence of other lotteries being operated in this jurisdiction which had not been made subject to the lottery statute and

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[1] Some corroboration for this is found in the testimony of the officer's partner who testified that although occupied with another matter at the time, he had heard the noise of the other car's tires (Tr. 25).

On cross-examination, defense counsel brought out that there was a construction barricade across 11th Street at the time which was said to necessitate the U-turn in order to leave the street (Tr. 18).

argued that appellant was being denied equal protection of the laws (Tr. 63-66). During a bench conference, the trial judge stated he would not admit the exhibits into evidence except for two which had been marked for identification and were being used to cross-examine the Government's expert witness on gambling operations (Tr. 66). However, when the two exhibits were actually offered, the trial judge reconsidered his initial ruling and concluded that the exhibits were irrelevant and should not be shown to the jury (Tr. 67).

Appellant did not take the stand and offered no additional evidence (Tr. 68). After being instructed, the jury deliberated and returned a verdict of guilty as charged.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . ; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 22, District of Columbia Code, Section 1501, provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing carrying on, promoting, or advertising, directly or indirectly,

any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Title 22, District of Columbia Code, Section 1502, provides:

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

SUMMARY OF ARGUMENT

I.

Where appellant was stopped by a police officer for a traffic violation and exposed envelopes used in numbers operations when he produced his automobile registration card, the stopping was tantamount to an arrest and the seizure of the numbers was incident to the arrest. Moreover, under the circumstances there was no search where the numbers envelopes were in plain view of the police officer who had stopped appellant for the traffic violation. The officer could not ignore the numbers envelope but was under a duty to seize them as instrumentalities of a crime.

II.

Appellant's proffer of exhibits relating to whether commercial organizations were operating lotteries in this jurisdiction would have introduced extraneous matter which would have been confusing to the jury and its exclusion by the trial judge was proper. And even if it could have been shown that others were violating the law that was not a valid defense for the accused. Further, the contention that appellant was denied equal protection of the law as a victim of discriminatory enforcement was not pertinent. Appellant is entitled to equal protection of the laws, not equal protection *from* the laws. Moreover, the equal protection clause applies only to the States and not to the District of Columbia. Nevertheless, whether under the equal protection clause or the due process clause appellant's attempt to show the operation of other lotteries in the District of Columbia introduced irrelevant and immaterial issues, the resolution of which would have necessitated a trial within a trial posing an intolerable situation.

ARGUMENT

I. The numbers slips were not obtained as the result of an illegal search or seizure.

Appellant asserts that it was error for the court to deny his motion to suppress and return the property seized.[2] Appellant contends that since there was no search warrant and since there had been no arrest prior to the discovery of the envelopes, the seizure was illegal.

The court below sustained the seizure on the ground that when the police officer stopped appellant's car for the traffic violation appellant was under arrest even though the police officer did not formally advise appellant of an arrest until after the lottery slips fell out of the glove compartment, citing *Henry* v. *United States*, 361 U.S. 98 (1959). We believe that the seizure was proper either under this theory or under the plain view theory. It is not a "search" to observe what is clearly and plainly to be seen. See, *e.g.*, *Hiet* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 911 (1967); *Dorsey* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 928 (1967); *Norman* v. *United States*, D.C. Cir. Nos. 20243-5 decided May 9, 1967. Under this latter theory, the police officer who stopped appellant's car for a traffic violation[3] and saw numbers slips was not required to ignore them. See *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953). When the police officer saw appellant's automobile operated in violation of the traffic regulations, it was proper for him to stop the automobile to request the registration and where the act of producing the registration revealed numbers slips it was his duty to seize them even without a search warrant. *Goodwin* v. *United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied, sub nom.*

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[2] The memorandum opinion of the court below on the point is reported at 249 F.Supp. 40 (1965).

[3] See, *e.g.*, 40 D.C. Code § 605(b) (reckless driving); Traffic and Motor Vehicle Regulations of the District of Columbia Sec. 44 (limitations on turning around).

Vaughn v. *United States*, 382 U.S. 855 (1965) and *Williams* v. *United States*, 382 U.S. 920 (1965); *Fisher* v. *United States*, 92 U.S. App. D.C. 247, 205 F.2d 702, *cert. denied*, 346 U.S. 872 (1953). See also *Hiet* v. *United States*, *supra*.

II. The trial court properly excluded appellant's proffered exhibits.

(Tr. 66, 67)

Appellant's next point is that it was error for the trial judge "to strike defendant's exhibits from the record."[4] The two exhibits were not stricken from evidence as appellant asserts, but rather were not admitted into evidence when the judge reconsidered his opinion after initially indicating to defense counsel that they would be admitted (Tr. 66, 67). These exhibits did not relate to appellant's guilt or innocence but to whether commercial organizations were supposedly conducting lotteries in this jurisdiction contrary to law.[5] The admission of such evidence would have introduced extraneous issues not involved in the trial and would only have served to confuse the jury. Therefore, the trial court was correct in excluding these and the other proffered exhibits as being irrelevant and immaterial. It is a settled rule that when guilt is clearly established by competent evidence, the admission or exclusion of other evidence which does not affect the substantial rights of the accused, even if erroneous, does not call for the reversal of a conviction. *Starr* v. *United States*, 105 U.S. App. D.C. 91, 264 F.2d 377, *cert. denied*, 359 U.S. 936 (1958); *Guy* v. *United States*, 71 App. D.C. 89, 107 F. 2d 288 (1939).

Appellant further assserts that he was denied equal protection of the laws under the Fourteenth Amendment;

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[4] Appellant's brief p. 10.

[5] Even if this could be shown to be true the fact that others are violating the law is no defense for the accused. *United States* v. *Rickenbacker*, 309 F.2d 462 (2d Cir.), *cert. denied*, 371 U.S. 962 (1963); *Grell* v. *United States*, 112 F.2d 861 (8th Cir. 1940).

however, the proffer by appellant that he was the victim of discriminatory enforcement was not pertinent. See *United States* v. *Rickenbacker*, supra; *Society of Good Neighbors* v. *Van Antwerp*, 324 Mich. 22, 36 N.W. 2d 308 (1949). Appellant is entitled to equal protection of the laws but not to equal protection *from* the laws. *United States* v. *Manno*, 118 F. Supp. 511, 515 (N.D. Ill. 1954). Furthermore this Court has held in civil matters that the equal protection clause is directed to the States and does not apply to the District of Columbia and that equal protection of the laws exists in the District of Columbia under the due process clause. *O'Connor* v. *District of Columbia*, 80 U.S. App. D.C. 351, 153 F.2d 225 (1946). But whether under the equal protection clause or the due process clause, appellant's attempt to show the existence of other lotteries operating in the District of Columbia, as noted above, introduced irrelevant and immaterial issues which would unnecessarily confuse the jury. Furthermore, it had not been established by law that the games advertised in the exhibits proffered by appellant were lotteries and this would have necessitated a trial of those companies sponsoring the advertised games which would have posed an intolerable situation at trial.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 20,237

JUNIUS S. WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING EN BANC

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In connection with that proposition the appellant claims that this rule of evidence is substantive and that having proffered evidence sufficient to bring the rule into play and that the appellant had an independent right to demand that the Trial Court recognize the proffered exhibits as prima facie evidence of operation of a lottery and to admit them into the case so that upon final determination that aspect of the defense of unequal protection of the law could be determined.

If it was or is the conclusion of the Trial Court or this Court that below appellant had not made a sufficient showing of the existence of other lotteries, upon what legal basis can this assertion be maintained the statutory presumption being sufficient to convict one charged with operation of a lottery? How does it become insufficient to establish the fact for purposes of evidence that a lottery, such as attempted to be estab lished in this case exists?

It would appear that this is but an additional evidence of unequal protection of the law for in this case the presumption sufficed to convict appellant, and he was forbade to ask that it be considered as matter of defense sufficient to avoid conviction.

In BARRETT v UNITED STATES, 322 F 2d. 292, 294, C.C.A.5; 1963, it is stated:

> (1,2) Footnote 1.
> A rule of presumption is simply a rule changing one of the burdens of proof i.e. declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced.

> There is not the least doubt on principle, that the Legislature has entire control over such rules, as it has (when not infringing the Judiciary's prerogative) over all other rules of procedure in general and even in particular subject only to the limitations of the Rules of Evidence expressly en shrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. 4 Wigmore on Evidence, 1353. (3d Ed. 1940).

Ergo, if the prosecution could establish operation of a lottery upon the frima facie case established by the introduction of "numbers slips"under a fair trial by due process of law the appellant could do the same.

Further relating to the necessity of making a better showing it is fair to contend that the Trial Court and this Court judicially know that a wide variety and a large number of lotteries are openly and continually conducted in this judicial district; they Judicially know that the lotteries are openly advertised by Newspapers, by radio and by television.

In C.J.S. Vol. 31, pp.511, 512, it is said:

> Courts will take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction; and they ought not to assume ignorance or, or exclude from their knowledge matters which are known to all persons of intelligence.

The same authority states that:

> Judicial notice or knowledge may be defined as the cognizance of certain facts which Judges and Jurors may properly take and act on without proof because they already know them.

Courts judicially note its own records and appellant contends that from the records in the United States District Court

for the District of Columbia it is a known fact that no prosecution has been undertaken by the United States District Attorney or entertained by any Court and Jury in connection with any of the lotteries concerning which appellant makes complaint.

It is entirely possible that the deductions reached by counsel for the appellant are not only at variance with those of the Judges involved in this matter, but that counsel's deductions may be defined as strained, however, this much seems to be incontestible; (1) There was legal proof of the existence of lotteries which were never prosecuted (2) there was no evidence nor any claim made that the prosecution of appellant and the immunity of other lottery operators was not the result of patent discrimination.

When it is considered that the Trial Court stated that the defense of unconstitutionality could not be raised and maintained through the medium appellant's proffered exhibits upon the basis that the constitutionality of the statute involved had been established long ago it would appear that the opportunity of making a more detailed showing below was cut off in limine; that the Court below never considered or ruled upon the proposition that the discrimination in enforcement was the problem he was asked to determine, and that this Court has not ruled upon that question at all.

CONCLUSION

The appellant contends that in the present condition of

this cause this Court should remand the matter to the Trial Court with instructions to take testimony upon the matter of discriminatory prosecution; or in the alternative reverse the case entirely.

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Counsel for appellant.

CERTIFICATE OF SERVICE

I certify that on this 1st day of April, 1968, I deposited copy of the foregoing Petition in the office of the United States Attorney for the District of Columbia, 3rd Floor, U. S. District Court House, Washington, D. C., 20001.

T. Emmett McKenzie